

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
XO LONG DISTANCE SERVICES, INC. AND)  
XO COMMUNICATIONS SERVICES, INC. )  
For Approval of an Internal )  
Corporate Reorganization and For )  
Approval, As Necessary, of Related )  
Transactions. )  
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DOCKET NO. 04-0177

DECISION AND ORDER NO. 21360

Filed Sept. 22, 2004  
At 9 o'clock A.M.

Karen Higashi.  
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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Chief Clerk, Public Utilities  
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K. Higashi.

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DECISION AND ORDER

I.

## Introduction

XO LONG DISTANCE SERVICES, INC. ("XOLD") and  
XO COMMUNICATIONS SERVICES, INC. ("XO Communications")  
(collectively "Applicants" or "XO Subsidiaries"), request that the  
commission approve or grant such authority as may be necessary for  
an internal corporate reorganization whereby XOLD will be merged  
into its affiliate, XO Communications ("Proposed Transactions").<sup>1</sup>  
Applicants make their request, pursuant to Hawaii Revised Statutes  
("HRS") § 269-19. Applicants also request, by a letter filed on  
September 7, 2004, a waiver of the requirements of HRS § 269-16.92,  
pursuant to HRS § 269-16.9(e) and Hawaii Administrative Rules  
("HAR") § 6-80-135.<sup>2</sup>

<sup>1</sup>Applicants' application, filed on July 20, 2004 ("Application").

<sup>2</sup>Applicants' letter, filed on September 7, 2004.

Applicants served a copy of the Application on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate").<sup>3</sup> The Consumer Advocate, stated in its Statement of Position, filed on August 31, 2004 ("Statement of Position"), that it does not object to the approval of the Proposed Transactions, described above, subject to certain qualifications, discussed below.

## II.

### Background

#### A.

#### Overview of Subject Entities

XOLD, fka NEXTLINK Long Distance Services, Inc., is a public utility that holds a commission-issued certificate of authority ("COA") to provide intrastate telecommunications services on a resold basis within the State of Hawaii ("State").<sup>4</sup> XOLD is a wholly-owned subsidiary of XO Communications, Inc. ("XO"), a Delaware corporation, with its principal office and place of business located in Reston, Virginia. XO Communications is also a

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<sup>3</sup>The certificate of service attached to the July 20, 2004 application certifies that Applicants served the Consumer Advocate a copy of the application on July 19, 2004. However, by letter dated July 27, 2004, the Consumer Advocate informed Applicants that it did not receive copies of the application, pursuant to HAR § 6-61-18. The record indicates that the Consumer Advocate received a copy of the application on August 3, 2004. Applicants are reminded that, unless otherwise required by another provision of HAR chapter 6-61 or by the commission, each party shall serve two (2) copies of an application, complaint or other pleadings on the Consumer Advocate, pursuant to HAR § 6-61-18.

<sup>4</sup>Decision and Order No. 17493, filed on January 25, 2000, in Docket No. 99-0208.

wholly-owned subsidiary of XO. Applicants represent that XO Communications is currently authorized to transact business in Hawaii as a foreign corporation.<sup>5</sup>

B.

Description of Proposed Transactions

Applicants propose a series of transactions, whereby XOLD, XO's operating subsidiary in Hawaii, will be merged into its affiliate, XO Communications ("Proposed Merger"). To complete the merger, Applicants intend to transfer XOLD's intrastate customer base, tariff and COA to XO Communications. Subsequent to the merger, XOLD will cease to exist by operation of law, and XO Communications will assume all of XOLD's assets and operations and will provide intrastate telecommunications services to XOLD's customers pursuant to XOLD's tariff, amended with the new name XO Communications. Therefore, in addition to approval of the proposed merger, Applicants further request commission approval to transfer XOLD's COA to XO Communications (collectively, transfer of XOLD's assets and COA referred to as "Related Proposed Transfers").

In support of their application, Applicants represent the following:

1. "Because XOLD and XO Communications are managed by the same team of experienced telecommunications personnel, day-to-day operations will continue to function as they have in the past";

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<sup>5</sup>Applicants' Application at 3.

2. "Customer service functions will be provided by the same team of qualified consumer representatives"; and
3. "In order to facilitate a seamless transfer, XO Communications will file a revised tariff, as required, to reflect its slightly changed name," and XOLD's customers "will continue to receive high quality services from the same qualified personnel, at substantially similar rates, terms and conditions."

Thus, Applicants assert that the Proposed Transactions "will be virtually transparent to consumers in Hawaii and will have no adverse impact on them." Moreover, the Proposed Transactions "will provide significant reductions in legal, accounting and tax administrative burdens and will simplify the XO companies' corporate structure, eliminating administrative redundancy and improving the companies' overall efficiency thereby enhancing the company's ability to compete in Hawaii and elsewhere."

B.

Consumer Advocate's Position

As stated in its Statement of Position, the Consumer Advocate recognizes "the telecommunications service XOLD provides in Hawaii is fully competitive. . . [and] the entry of many telecommunications service providers in the Hawaii market." The Consumer Advocate asserts that "[t]he market, it is assumed, will then serve to mitigate any traditional public utility

regulatory concerns" regarding the Proposed Transactions, described above. As such, the Consumer Advocate states that it does not object to commission approval of the Proposed Transactions, provided the following conditions are met:

1. XOLD surrenders its COA; and
2. A copy of the following documents be provided to the commission and the Consumer Advocate:
  - a. XOLD's 2003 financial statements and other information as required under HAR § 6-80-91 (i.e., balance sheet and income statement);
  - b. XO Communications' initial tariff including tariff revisions required by Decision and Order No. 17493, filed on January 25, 2000, in Docket No. 99-0208; and
  - c. A copy of the merger agreement between XOLD and XO Communications, pursuant to HAR § 6-61-105(c)(2).

### III.

#### Discussion

##### A.

#### Proposed Merger

HRS § 269-19 provides, in relevant part, that "[n]o public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of the whole or any part of its road, line, plant, system, or other property necessary or useful in the

performance of its duties to the public, or any franchise or permit, or any right thereunder, nor by any means directly or indirectly, merge or consolidate with any other public utility corporation, without first having secured from the public utilities commission an order authorizing it so to do." HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Thus, the commission has jurisdiction to review proposed transactions of the parent entity of a regulated public utility under HRS § 269-7(a). The Proposed Merger and Related Proposed Transfers, described above, fall under our purview under HRS §§ 269-19 and 269-7(a).

Nonetheless, HRS § 269-16.9 also permits us to waive regulatory requirements applicable to telecommunications providers if we determine that competition will serve the same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits us to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

Upon review of the record in this docket, particularly Applicants' representations, we find the following: (1) much of the telecommunications services currently provided by XOLD and its affiliates such as XO Communications are competitive; (2) XOLD and XO Communications are non-dominant carriers in Hawaii; (3) the Proposed Merger and Related Proposed Transfers are consistent with the public interest; and (4) competition, in this

instance, will serve the same purpose as public interest regulation.

Based on the foregoing, the commission, on its own motion, will waive the requirements of HRS §§ 269-19 and 269-7(a), to the extent applicable, regarding the Proposed Merger and the Related Proposed Transfers (except for the transfer of XOLD's COA to XO Communications, which will be separately addressed in Section III.B. below), pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.<sup>6</sup> Similarly, we also find it in the public interest to waive the applicability of HAR § 6-61-105 to the extent that the Application in this docket is not in compliance with those rules. Thus, for purposes of considering this Application, we will not require the information and documents normally required upon the filing of such Application.

Notwithstanding the commission's waiver of the requirements noted above, the commission agrees with the Consumer Advocate's recommendation that certain information and documents should be provided to the commission and the Consumer Advocate subsequent to the issuance of this decision and order. Therefore, we will adopt the Consumer Advocate's

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<sup>6</sup>At the same time, the commission will continue to examine a utility's application or petition on a case-by-case basis to determine whether the applicable requirements of HRS §§ 269-19, 269-17 and 269-7(a) or any other related provision governing utility transactions, should be waived. The commission's waiver in this decision and order shall not be construed by any utility as a basis for not filing an application or petition involving similar transactions or circumstances.



recommended conditions, in part,<sup>7</sup> particularly to require the submission of certain information and documents. Applicants are required to submit a copy of the following documents to the commission and the Consumer Advocate for their records within thirty (30) days of the date of this decision and order:

1. A copy of the merger agreement between XOLD and XO Communications; and
2. A copy of the certificate of authority to transact business in the State as a foreign corporation from the Department of Commerce and Consumer Affairs.

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<sup>7</sup>In light of our decision in Section III.B., we will not require XOLD to surrender its COA, as recommended by the Consumer Advocate. See, *In re Teleglobe USA LLC et al.*, Docket No. 03-0239, Decision and Order No. 20729 (January 5, 2004) (approving the assignment of the COA, subject to certain conditions). Second, we will not adopt the Consumer Advocate's recommendation requiring XO Communications to file its initial tariff including the necessary tariff revisions required by Decision and Order No. 17493. Although the Consumer Advocate claims that XO Communications' predecessor's revised tariff failed to comply with Decision and Order Nos. 17493 and 19826, the Consumer Advocate did not explain why the revised tariff is not in conformance with these decisions and orders. Nonetheless, we will require XO Communications to promptly file its initial tariff, incorporating any changes necessary to assume the services of XOLD. See, *In re BellSouth BSE, Inc. et al.*, Docket No. 04-0076, Decision and Order No. 21084 (June 25, 2004). We will also allow the Consumer Advocate twenty (20) days from date it is served with XO Communications initial tariff to comment and provide any recommendations to such tariff. Finally, our records indicate that XOLD's 2003 financial statements and information, as required under HAR § 6-80-91, were submitted to the commission on forms prescribed by the commission and attached to XOLD's 2003 Annual Report of Resellers and Various Telecommunications Services, filed on March 15, 2004. Therefore, concerning the Consumer Advocate's recommendation requiring Applicants to submit copies of XOLD's 2003 financial statements and other information required under HAR § 6-80-91 to the commission and the Consumer Advocate, we will only require Applicants to submit a copy of XOLD's 2003 financial statements and other information to the Consumer Advocate within thirty (30) days of the date of this decision and order, pursuant to HAR § 6-80-91.

B.

Proposed Transfer of XOLD's COA to XO Communications

HRS § 269-19 also specifically provides, in relevant part, that: "[N]o public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of . . . any franchise or permit, or any right thereunder . . . without first having secured from the public utilities commission an order authorizing it so to do."

Applicants contend that XO Communications "is backed by the same qualifications as XOLD and will provide the same high quality services to customers." Moreover, as reflected in the corporate organizational charts attached hereto as Exhibit A, "the ownership of XO Communications will be identical to its current ownership and ownership of XOLD."

Upon reviewing and taking official notice of all pertinent documents in the commission's records relating to XOLD and XO, pursuant to HAR § 6-61-48, we find that XO Communications has fulfilled the requirements of HAR § 6-80-18,<sup>8</sup> to the extent

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<sup>8</sup>Notwithstanding XOLD's alleged failure to comply with Decision and Order No. 19826 and Decision and Order No. 17493, as asserted by the Consumer Advocate, the commission finds that upon review of the entire record, XO Communications is fit, willing, and able to properly perform the telecommunications services and to conform to the terms, conditions, and rules prescribed or adopted by the commission. See, *In re Latitudes & Adatudes Adventure Tours, LLC*, Docket No. 99-0081, Decision and Order No. 18665, (July 2, 2001) (holding that past violations, if any, do not necessarily preclude the commission from finding that an applicant for a certificate of public convenience and necessity is fit, willing, and able to conform to the motor carrier statutes and the commission's rules and regulations).

applicable.<sup>9</sup> Thus, we will approve the transfer of XOLD's COA to XO Communications, pursuant to HRS § 269-19, subject to the following conditions:

1. Within thirty (30) days of the date of this decision and order, XO Communications shall file its initial tariff, incorporating the change in name from XOLD; and
2. XO Communications shall continue to be accountable for any and all of XOLD's unpaid public utility fees due to the commission, pursuant to HRS § 269-30, and any and all of XOLD's annual financial reports that are required to be filed with the commission in accordance with HAR § 6-80-91.

C.

HRS § 269-16.92 Requirements

HRS § 269-16.92 provides that a telecommunications carrier shall not initiate a change in a subscriber's selection or designation of a long distance carrier without first obtaining authorization from the affected subscriber.

Applicants seek a waiver of HRS § 269-16.92, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135. They explain:

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<sup>9</sup>Moreover, based on our finding made above that competition, in this instance, will serve the same purpose as public interest regulation, we will also, on our own motion, waive the requirements of HAR § 6-80-17(c) to the extent that the instant application did not fully comply with the requirements.

1. XOLD currently provides service to fourteen (14) customers in the State;
2. Applicants' position is that compliance with the slamming requirements with respect to customers transferred from XOLD to XO Communications should not be required because "it is a pro forma transaction that is 'invisible' to the affected customers;"
3. "These customers, including the XOLD customers in Hawaii, will continue to see the 'XO' name on their invoices and have the same contact number; they will continue to receive the same services at the same rates, terms and conditions; and they will continue to have XO and its management as their corporate parent;" and
4. Providing notice to these customers, as required under HRS § 269-16.92, "would be confusing to them."

Based on the above representations and our finding made above that competition, in this instance, will serve the same purpose as public interest regulation, we conclude that Applicants' request for a waiver should be granted, and that the requirements of HRS § 269-16.92, to the extent applicable, should be waived.

IV.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-19 and 269-7(a), to the extent applicable, are waived with respect to the Proposed Merger and the Related Proposed Transfers (except for the transfer of XOLD's COA to XO Communications), subject to the applicable filing conditions described in Ordering Paragraph 8 below.

2. To the extent that the Application does not contain all of the information required under either HAR § 6-61-105 or 6-80-17(a), the applicability of those sections is waived, subject to the applicable filing conditions described in Ordering Paragraph 8 below.

3. The transfer of XOLD's COA to XO Communications to operate as a reseller of telecommunications services in the State is approved, pursuant to HRS § 269-19 and subject to the following conditions:

- a. Within thirty (30) days of the date of this decision and order, XO Communications shall file its initial tariff, incorporating the change in name from XOLD; and
- b. XO Communications shall continue to be accountable for any and all of XOLD's unpaid public utility fees due to the commission, pursuant to HRS § 269-30, and any and all of XOLD's annual financial reports that are

required to be filed with the commission in accordance with HAR § 6-80-91.

4. The requirements of HRS § 269-16.92, to the extent applicable, are waived.

5. As the holder of a COA, XO Communications shall be subject to all applicable provisions of HRS chapter 269, HAR chapters 6-80 and 6-81, any other applicable State laws and commission rules, and any orders that the commission may issue from time to time.

6. XO Communications shall file its tariffs in accordance with HAR §§ 6-80-39 and 6-80-40. Said tariffs shall comply with the provisions of HAR chapter 6-80. In the event of a conflict between any tariff provision and State law, State law shall prevail.

7. An original and eight (8) copies of the initial tariff shall be filed with the commission with additional copies served on the Consumer Advocate. XO Communications shall ensure that the appropriate issued and effective dates are reflected in its tariffs. The Consumer Advocate may provide comments and recommendations, if any, to XO Communications initial tariff within twenty (20) days after being served of such tariff.

8. Within thirty (30) days from the date of this decision and order, Applicants, collectively and/or XOLD or XO Communications, independently, shall submit the copies of the following documents or information to the commission and the Consumer Advocate:

- a. A copy of the merger agreement resulting in the merger of XOLD into XO Communications; and
- b. A copy of the certificate of authority to transact business in the State as a foreign corporation from the Department of Commerce and Consumer Affairs.

Within thirty (30) days from the date of this decision and order, Applicants shall also submit a copy of XOLD's 2003 financial statements and other information to the Consumer Advocate within thirty (30) days of the date of this decision and order, as required under HAR § 6-80-91.

9. Applicants shall promptly comply with the requirements set forth above. Failure to promptly comply with these requirements may constitute cause to void this decision and order, and may result in further regulatory action, as authorized by law.

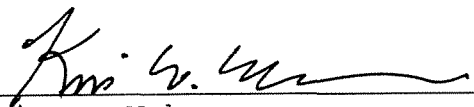
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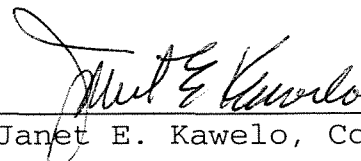
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By (EXCUSED)  
Wayne H. Kimura, Commissioner

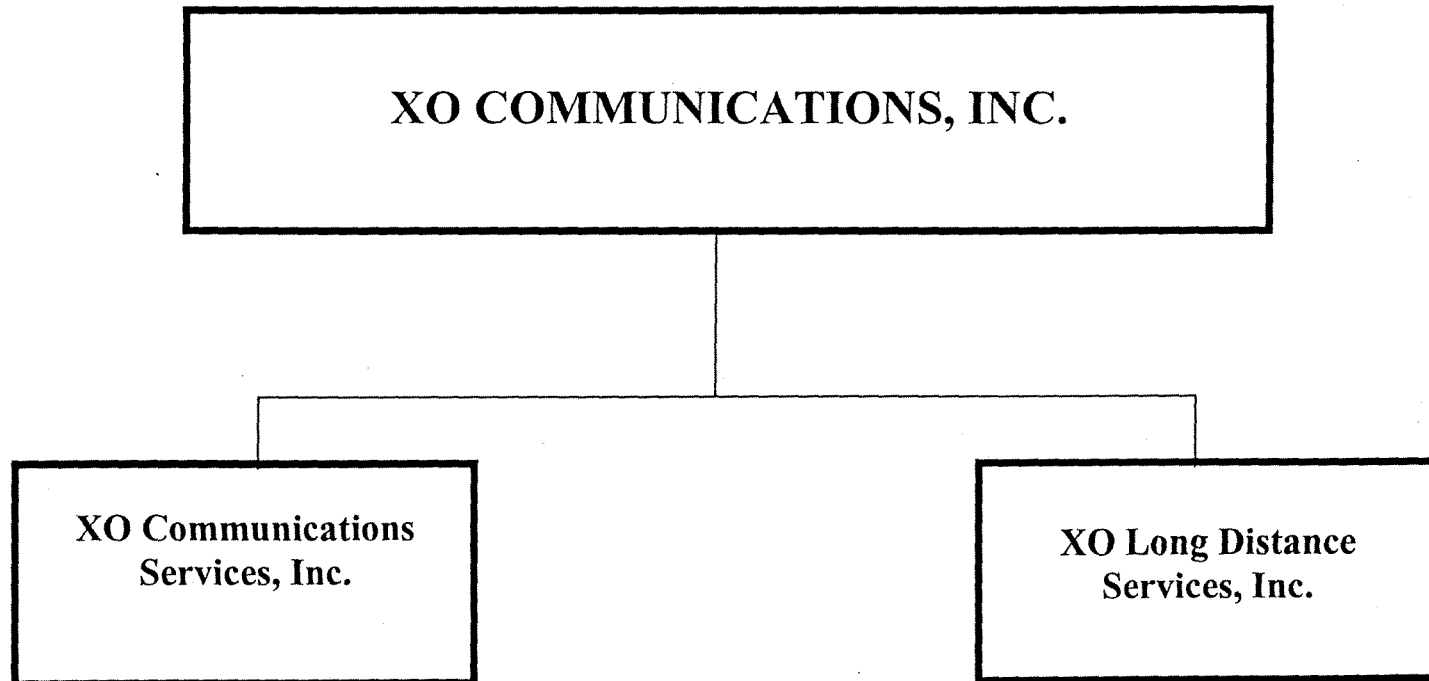
APPROVED AS TO FORM:

  
Kris N. Nakagawa  
Commission Counsel

By   
Janet E. Kawelo, Commissioner

04-0177.eh

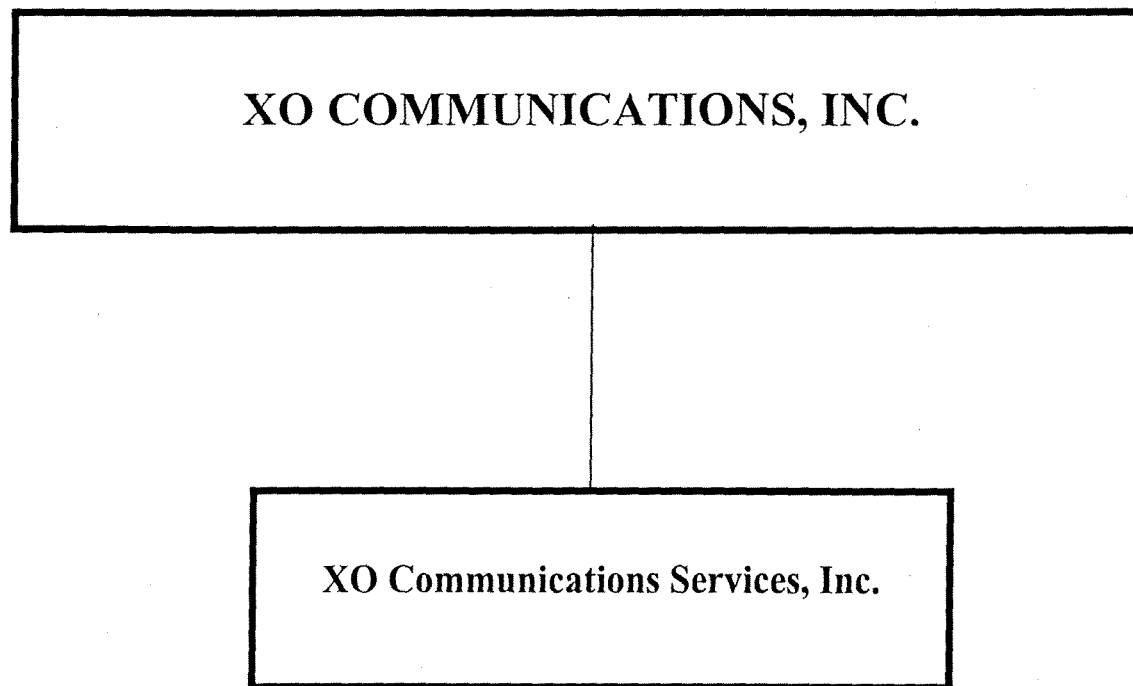
# EXISTING CORPORATE STRUCTURE<sup>1</sup>



<sup>1</sup> Each entity is 100% owned by the entity immediately above it, unless otherwise indicated.



# CORPORATE STRUCTURE AFTER RESTRUCTURING<sup>1</sup>



<sup>1</sup> Each entity is 100% owned by the entity immediately above it, unless otherwise indicated.

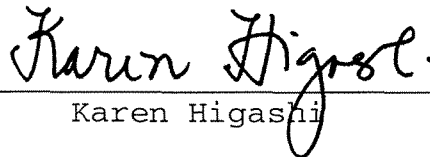
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21360 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
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\_\_\_\_\_  
Karen Higashi

DATED: SEP 22 2004